FINDINGS OF FACT

Procedural

David McCann (McCann) was employed with the County as a Purchasing Agent by the County Executive and was subject to the County Executive's personnel rules and procedures

. He was so employed at the time of the discipline that is the subject of these appeals. A hearing on appeal 06-01, a thirty (30) day suspension began June 5, 2006. That hearing was adjourned to wait on availability of witnesses. In the interim, McCann was terminated and he appealed that action in appeal 06-02. With no objection, the two appeals were combined.

Rules and regulations for which classified county employees are subject are found in **Summit County Council Ordinance 2004-596** which is to be applied to all county employees Found in the Clerk of Courts, Councty Council, County Engineer, County Executive, County Fiscal Officer, County prosecutor, County Sheriff.
The Court of Common Pleas is exempt from participation by order of the State of Ohio. (See Attorney General Opinion 96-043 dated August 27, 1996).

The County Executive is expected to follow the law; in this case County Ordinance 2004-596.

Hearing

The hearing was held over four (4) days and concluded July 12, 2006. Each side had until August 11,1006 to file closing statements.

County Witnesses and Exhibits. The County presented the following witnesses: Brian Nelsen, Michelle Smith and Leonard Foster. The County also presented thirteen (13) exhibits marked Exhibits A-M.

Also serving as the advocate for the County of Summit Executive's Office was the Hearing Officer who knowingly, and by her own volition consulted regularly with counsel for the County Executive, Kasie Briggs.

Page 94

THE HEARING OFFICER: Well, that's the
3 ruling.

4 MR. McCANN: So you and the Executive's
5 office have reached this conclusion?

6 THE HEARING OFFICER: Absolutely not.

7 MR. McCANN: You have not been in
8 communication with the Executive's office?

9 THE HEARING OFFICER: With whom in the
10 Executive's office?

11 MR. McCANN: Members of the
12 Law Department.

13 THE HEARING OFFICER: Oh, yes, I have
14 spoken to Kasie.

15 MR. McCANN: Is that appropriate?

16 THE HEARING OFFICER: Yes. I've spoken to
17 you.

18 MR. McCANN: When have you spoken to me?

19 THE HEARING OFFICER: When I see you in
20 the office.

21 MR. McCANN: Let's see, last week it was,
22 "Have you been helped?"
23 And this morning it was, "Let's get
24 going."

25 THE HEARING OFFICER: Right.

McCann Witnesses and Exhibits. McCann subpoenaed one hundred and two (102) witnesses. Three (3) of the subpoenas were quashed. Of the one hundred and two (102), ninety-seven (97) appeared and McCann waived the appearance of the rest.

Many of the witnesses that appeared represented a variety of appointing authorities within the County, to include: the Fiscal Office, Human Resource Commission, County Executive, Board of Elections, Clerk of Courts, Sheriff, Internal Audit, Engineer, Ninth District Court of Appeals, Veterans Service Commission, Board of Mental Retardation and Developmental Disabilities, Common Pleas Court (Juvenile Division), Common Pleas Court (General Division) and the Prosecutor. T

The vast majority of these witnesses stated that McCann treated them courteously and was competent.

However, with two (2) exceptions, none of them had any personal knowledge of the events concerning McCann's discipline.

McCann presented a total of sixteen (16) exhibits. Other

Move from anger management to work performance issues (plural)

So -Why the ordered referral for Mr. McCann to an MD/psychiatrist as opposed to MA/PhD/psychologist for the alleged ***plural problems*** of "work performance issue***s***"? See HIPPA violations Page 9

This is in sharp contract to the original order which dealt specifically with a referral for the ***single*** issue of "anger management".

Neither party called Linda Phelps, Jill Skapin or McCann. During the July 21,2006 hearing McCann stated: I have no intention of calling the Director of Finance and Budget [Phelps]. I have no intention of calling the Director of Communications [Skapin]. And I have no intention of calling Brian Nelsen. McCann reiterated his refusal to call Phelps, Nelsen or Skapin three (3) additional times. McCann did allow himself to be sworn in during his questioning of Blevins on June 21, 2006.

Between the hearings of June 5 and June 21, McCann prepared, signed and presented a notarized statement authorizing the disclosure of health information by Blevins.

I would not allow the **Purveyors of Prevarication** to testify – as there is no penalty for perjury – my witnesses proved, quite satisfactorily, how obscene their prevarications were.

Facts

Linda Phelps (Phelps) is the Director of Finance and Budget for the County Executive. Brian Nelsen (Nelsen) is the Deputy Director of Finance and Budget and reports to Phelps. Nelsen is responsible for three areas of the Department of Finance and Budget: office services; purchasing; and, finance and budget. The three areas employ seventeen (17) employees, including McCann whom Nelsen supervised.

McCann's responsibilities included surplus inventory, preparation and assistance with bid specifications, and advertising for requests for proposals.

July 10, 2006 Page 205
1 RENE DORNACK
2 of lawful age, a Witness herein, having been first duly
3 sworn, was examined and testified as follows:
Page 206
22 Q Would you say Mr. Nelson had overall responsibility
23 for Office Services or Mrs. Phelps?
24 A Mrs. Phelps has total control. He just does what
25 she tells him to do.

11 THE WITNESS: Dave's responsibilities
12 included surplus inventory, preparation and
13 assistance with bid specs and more recently
14 RFP packages, advertising of those items and
15 also assisting departments with getting
16 quotes and some other miscellaneous duties.

Page 262 July 12, 2006 Shannon McNulty Lysenko

16 Q My next question is this, if you had a problem
17 with information about pricing or issues regarding
18 competitive bids or requests for proposals, would
19 you go to Mr. McCann for assistance or Mr. Nelson?
20 A Mr. McCann.
21 Q And why is that?
22 A David is knowledgeable about all of the purchasing
23 procedures and he trained me in all of the
24 purchasing procedures.

On the afternoon of February 8,2006, Nelsen contacted McCann regarding a bid that McCann was working on. McCann stated that the document had been forwarded to the legal department. Nelsen asked McCann to forward the document to him. After waiting, Nelsen again contacted McCann regarding the document. Upon receipt of the document, Nelsen discovered that some, but not all, of the changes that Nelsen had requested that McCann make to the document had not been made. Nelsen also noted that McCann did not follow proper departmental procedure regarding paperwork.

Nelsen again contacted McCann and directed him to retrieve the document from the legal department.

VICTORIA REEDY Page 340
22 of lawful age, a Witness herein, having been first duly
23 sworn, as hereinafter certified, testified and said as
24 follows:
Page 341
1 BY MR. McCANN:
2 Q Vicki, would you kindly tell us your name and
3 spell your last name and your position with the
4 executive's office?
5 A Okay, it's Victoria Reedy, R-e-e-d-y, and I'm
6 executive assistant in the law department.
7 Q A very quick question for you, Vicki. Was I
8 always courteous in my communication with you and
9 timely in following up with the requirements of
10 bids specifications for legislation to be
11 submitted to council, following up on contracts
12 for vendors, disposal of inventory?
13 A Always.

Mr. McCann's Response
The Director of Finance and Budget knew the deadline for the submission of handling of a job assignment and was 4:00 PM; and the call coming at 3:25 PM expressing concern about a lined out dollar figure on the estimated amount of the bid was totally irrelevant; particularly as all information had been submitted to Vicki Reedy

I walked into the Director's Deputy's Office straightaway expressing my great displeasure and saying write me up or fire me

My voiced was raised – ***and there is a difference***

No – ***my voice was raised and I was cross***

By the time of my appearance at 3:50PM – no work activity was affected

I have not been overwhelmed – until this date - when the Director sought to to create chaos over a non-issue

I have never once in my 18 years of service have I ever lost my temper; no profanity was used.

Testimony of July 10 and 12th certainly prove my ability to work with other employees and department heads

During the course of this conversation, Nelsen stated that McCann's voice became more angry and louder. Nelsen stated that McCann made the following statements:

"if you want it done call [the legal department] yourself," and "write me up or fire me."

Nelsen stated that McCann made the second comment "almost a half dozen times."

After which Nelsen stated he would write McCann up and hung up the phone.

Nelsen left his own office and walked to the adjoining office of Kathy Yee, Phelps was also present.

While Yee, Phelps and Nelsen were in Yee's office McCann entered the office area.

Nelsen stated that McCann was "yelling at the top of his lungs, 'go ahead, write me up, fire me,' over and over again."

Ann Shuman (Shumran), an employee in the Office of Budget and Management, confirmed that she heard loud voices from the direction of Phelps' and Yee's office. Phelps attempted to get McCann to enter Nelsen's office but McCann refused. Ultimately, McCann entered Nelsen's office wherein Phelps, Nelsen and McCann had a lengthy discussion.

Nelsen stated that at the conclusion of the meeting he believed that some sort of understanding had been reached between the parties.

Following that Phelps prepared a summary of the events and the meeting dated February 14, 2008 [sic]. County Exhibit A.

On February 14, 2006, McCann prepared a reply to Phelps' summary of the events. County Exhibit B. Upon reviewing McCann's reply, Nelsen believed that McCann was failing to take responsibility for his role in the events of February 8,2006. Additionally, Nelsen stated that other employees were concerned about the incident and that McCann's behavior might escalate.

On February 16, 2006 McCann filed a complaint with the Ohio Civil Rights Commission against "a female politically appointed director citing sexual harassment, the creation of a hostile work environment and sexual discrimination."

After conferring with legal counsel, Nelsen and Phelps determined that they would refer McCann to the County's Employee Assistance Plan (EAP) for anger management. On February 22, 2006, Nelsen completed the referral form. County Exhibit C.

On the form, Nelsen cited the February 8 incident as the "job performance issue that precipitated this referral." Nelsen stated on the referral:

On February 8th David became angered over my questioning of his handling of a job assignment and

On February 21, 2006 the Akron Beacon Journal ran an article regarding the OCRC filing

(d) Retaliation. No employee shall be retaliated against for making a good faith report of alleged discrimination or harassment or for participating in any investigation, proceeding or hearing conducted under the provisions of this section or any state agency. If an employee believes they are being retaliated against, they should follow the complaint procedure set forth herein. Any employee found to have retaliated against another employee shall be disciplined, up to and including, termination.

Summit County Ordinance 2004-596 169.21d

Mr. McCann's Response

The Director of Finance and Budget knew the deadline for the submission of handling of a job assignment and was 4:00 PM; and the call coming at 3:25 PM expressing concern about a lined out dollar figure on the estimated amount of the bid was totally irrelevant; particularly as all information had been submitted to Vicki Reedy

No – I walked into the Director's Deputy's Office straightaway expressing my great displeasure and saying write me up or fire me
my voiced was raised – ***and there is a difference***
No – ***my voice was raised and I was cross***
By the time of my appearance at 3:50PM – no work activity was affected

No such offers to help me with my workload have ever been made

I have not been overwhelmed – until this date - when the Director Linda Sowa Phelps sought to to create chaos over a non-issue

I have never once in my 18 years of service have I ever lost my temper; no profanity was used.

Testimony of July 10 and 12th certainly prove otherwise & my ability to work Effectively with management and other employees

my subsequent direction of his activity.

He subsequently appeared in the hallway outside the director's secretary's office yelling and creating a disturbance that affected the entire office.

David has ignored offers of assistance with his workload and has waited until he is overwhelmed and loses his temper.

He does not communicate with other employees or management.

In responding to the question on the form, "Has this been a re-occurring problem?," Nelsen wrote:

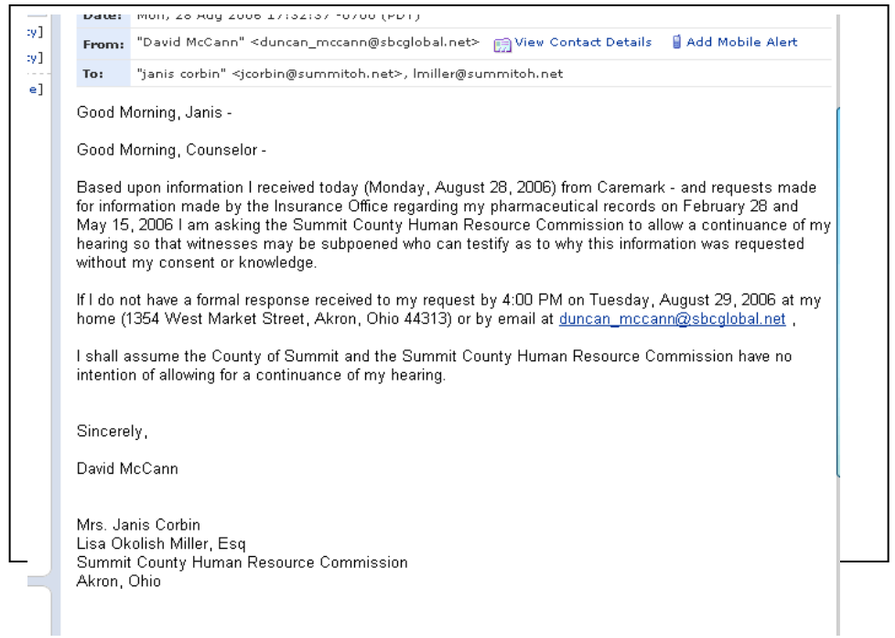
On March 2, 2006, Smith received a "Management/Supervisor Report Form" from Hershfield. County Exhibit D.

The form stated:

Employee attended session with EAP Counselor.

The Counselor has recommended that the employee receive a psychiatric evaluation as part of this comprehensive assessment.

EAP Counselor will assist employee in locating a psychiatrist within his health plan. Following the report from the psychiatrist and any recommendations that accompany it, the EAP Counselor will complete the treatment plan



Date: Mon, 28 Aug 2006 17:32:37 -0700 (PDT)

From: "David McCann" <duncan_mccann@sbcglobal.net> View Contact Details Add Mobile Alert

To: "janis corbin" <jcorbin@summitoh.net>, lmiller@summitoh.net

Good Morning, Janis -

Good Morning, Counselor -

Based upon information I received today (Monday, August 28, 2006) from Caremark - and requests made for information made by the Insurance Office regarding my pharmaceutical records on February 28 and May 15, 2006 I am asking the Summit County Human Resource Commission to allow a continuance of my hearing so that witnesses may be subpoened who can testify as to why this information was requested without my consent or knowledge.

If I do not have a formal response received to my request by 4:00 PM on Tuesday, August 29, 2006 at my home (1354 West Market Street, Akron, Ohio 44313) or by email at duncan_mccann@sbcglobal.net ,

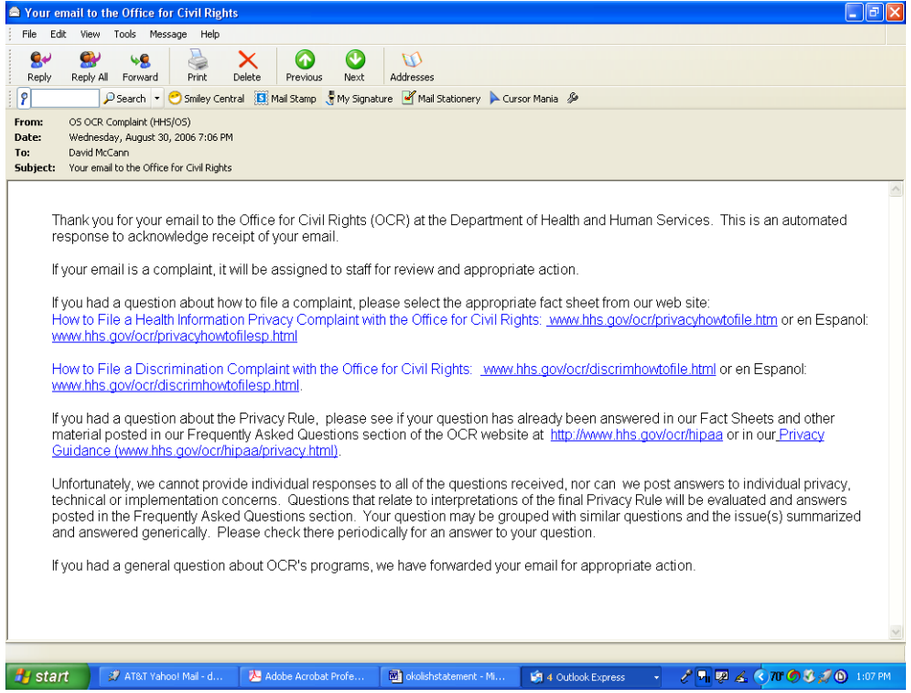
I shall assume the County of Summit and the Summit County Human Resource Commission have no intention of allowing for a continuance of my hearing.

Sincerely,

David McCann

Mrs. Janis Corbin
Lisa Okolish Miller, Esq
Summit County Human Resource Commission
Akron, Ohio

Your Health Information Is Protected By Federal Law
Who must follow this law?
Most doctors, nurses, pharmacies, hospitals, clinics, nursing homes, and many other health care providers
Health insurance companies, HMOs, most employer group health plans
Certain government programs that pay for health care, such as Medicare and Medicaid
What information is protected?
Information your doctors, nurses, and other health care providers put in your medical record
Conversations your doctor has about your care or treatment with nurses and others
Information about you in your health insurer's computer system
Billing information about you at your clinic
Most other health information about you held by those who must follow this law


Your email to the Office for Civil Rights
File Edit View Tools Message Help
Reply Reply All Forward Print Delete Previous Next Addresses
Search Smiley Central Mail Stamp My Signature Mail Stationery Cursor Mania
From: OS OCR Complaint (HHS/OS)
Date: Wednesday, August 30, 2006 7:06 PM
To: David McCann
Subject: Your email to the Office for Civil Rights
Thank you for your email to the Office for Civil Rights (OCR) at the Department of Health and Human Services. This is an automated response to acknowledge receipt of your email.
If your email is a complaint, it will be assigned to staff for review and appropriate action.
If you had a question about how to file a complaint, please select the appropriate fact sheet from our web site:
How to File a Health Information Privacy Complaint with the Office for Civil Rights: www.hhs.gov/ocr/privacyhowtofile.htm or en Espanol: www.hhs.gov/ocr/privacyhowtofilesp.html
How to File a Discrimination Complaint with the Office for Civil Rights: www.hhs.gov/ocr/discrimhowtofile.html or en Espanol: www.hhs.gov/ocr/discrimhowtofilesp.html.
If you had a question about the Privacy Rule, please see if your question has already been answered in our Fact Sheets and other material posted in our Frequently Asked Questions section of the OCR website at http://www.hhs.gov/ocr/hipaa or in our Privacy Guidance (www.hhs.gov/ocr/hipaa/privacy.html).
Unfortunately, we cannot provide individual responses to all of the questions received, nor can we post answers to individual privacy, technical or implementation concerns. Questions that relate to interpretations of the final Privacy Rule will be evaluated and answers posted in the Frequently Asked Questions section. Your question may be grouped with similar questions and the issue(s) summarized and answered generically. Please check there periodically for an answer to your question.
If you had a general question about OCR's programs, we have forwarded your email for appropriate action.
start
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Adobe Acrobat Profe...
okolishstatement - Mi...
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for this management referral. This will include continuing to see the EAP Counselor individually to assist

in improving work performance issues. This plan was shared verbally with the employee in this session. Employee verbally refused to comply with recommendations at this time.

This will include continuing to see the EAP Counselor individually to assist in improving work performance issues. This plan was shared verbally with the employee in this

session. Employee verbally refused to comply with recommendations at this time. EAP Counselor told employee that employer would be informed of his unwillingness to follow

through with psychiatric evaluation and ongoing EAP counseling.

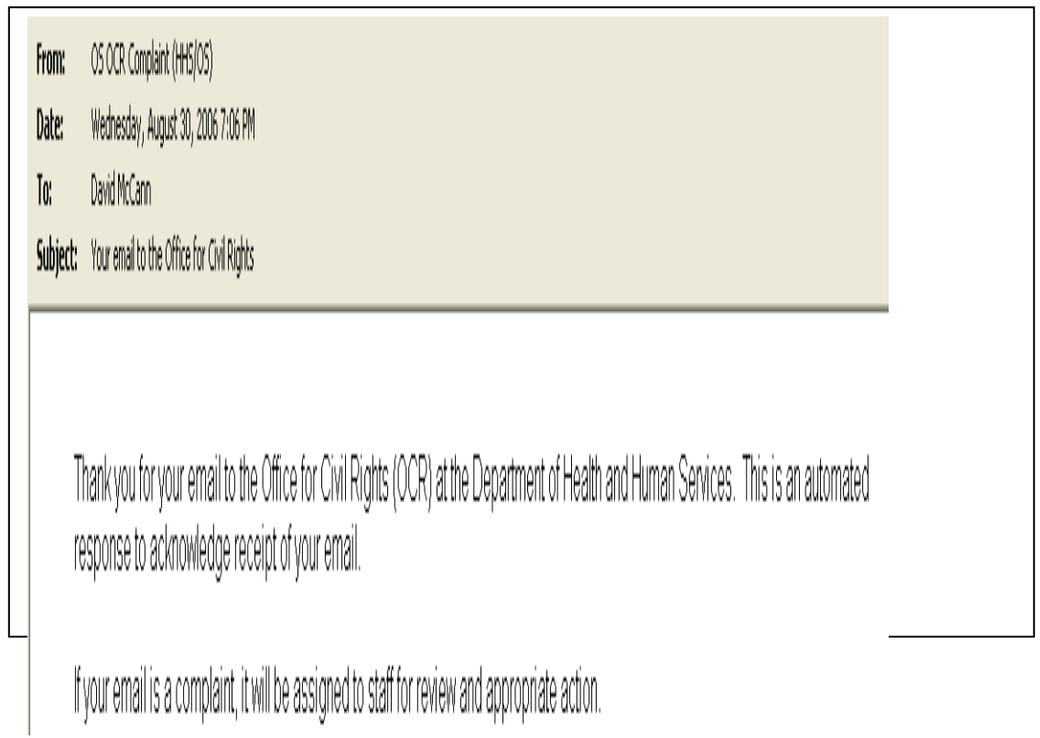
On March 17, 2006, McCann received a memorandum from Leonard Foster (Foster), the County Executive's Director of Human Resources. County Exhibit F. The memorandum stated, in part:

Please be advised that refusing to comply with the EAP Counselor's recommendation is not an option, you are required to comply. Please contact your EAP Counselor to make necessary arrangements.

On April 4, 2006, McCann received a Notice of Intent To Discipline from Foster. County Exhibit G. The notice stated that discipline was being recommended for failure to follow policy and procedure for the act of insubordination and that such disciplinary action may result in suspension or termination. The notice alleged that McCann was insubordinate for failing to follow the recommendations of the EAP counselor. The notice also provided McCann with the date and time of the pre-disciplinary meeting.

On April 10, 2006, Allyson Miller-Leonard (Miller-Leonard), a Director of Administration/Personnel for the County Sheriff, served as the hearing officer for McCann's pre-disciplinary hearing and issued a report. County Exhibit H. Miller-Leonard found that the facts were not in dispute. In her report Miller-Leonard stated:

The Employee read a prepared statement in response to the charges. [See Employee's Exhibit A.] Employee emphatically stated both verbally, and in his written statement as follows: "...Let me be quite clear …*I* have no intention now, or in the future, of having a psychiatric evaluation. I have no intention now, or in the future of attending anger management classes." [See Employee's Exhibit A, p.l.]



From: OS OCR Complaint (HHS/OS)

Date: Wednesday, August 30, 2006 7:06 PM

To: David McCann

Subject: Your email to the Office for Civil Rights

Thank you for your email to the Office for Civil Rights (OCR) at the Department of Health and Human Services. This is an automated response to acknowledge receipt of your email.

If your email is a complaint, it will be assigned to staff for review and appropriate action.

Miller-Leonard found just cause for discipline. However, Miller-Leonard went on to state:

Notwithstanding the above decision, this hearing officer urges the Employer to stay the imposition of any penalty for a period often (10) days to allow the Employee to comply with the order of March 17, 2006. The Employee was not represented by counsel, and this hearing officer is not convinced that the Employee understood the legal ramifications of failing to abide by the order of March 17,2006, i.e.. that discipline up to, and including termination, can be imposed for being insubordinate. The appropriate course of action for the Employee was to submit to the order but to acknowledge in writing he was submitting to the procedure under protest. Such a course of action would allow the Employee to still retain any affirmative defenses he might have to challenge the legality of the order while, at the same time, not subjecting himself to disciplinary charges for insubordination. If the Employee does submit to the order with this 10-day period, this hearing officer would encourage the Employer to consider this action as a mitigating factor in what discipline, if any, is imposed upon the Employee.

On April 13, 1006, McCann received a memorandum from James B. McCarthy (McCarthy), the County Executive. County Exhibit I. In this memorandum, McCarthy, took the suggestion of Miller-Leonard and stated:

You must comply with the EAP referral by April 24,2006. If you choose not to comply, you will be placed on unpaid administrative leave for insubordination for a period of thirty (30) days. If within that period you do not provide us with documentation of your compliance, your employment with the County of Summit will be terminated effective May 24,2006.

On April 26, 2006, McCann received a memorandum from Foster instituting the thirty (30) day suspension. County Exhibit J. Further, Foster advised McCann of his right to appeal and notice that further disciplinary action would take place if he did not comply with the recommendation of the EAP.

On April 27, 2006, Smith received another "Management/Supervisor Report Form" from Hershfield. County Exhibit E. The form stated:

This is to confirm the EASE@Work Intake has not received any calls from David McCann, since his initial contact for services. In addition, the EAP Counselor who had seen this employee has not received any calls to reschedule an appointment.

On May 31,2006, McCann received a Notice of Intent To Discipline from Foster. County Exhibit K. This notice reiterated the content of the first notice except that such disciplinary action may result termination. Foster also advised McCann of his right to a pre-disciplinary meeting.

On June 8, 2006, Miller-Leonard conducted a second pre-disciplinary hearing for McCann and issued a report. County Exhibit L. Miller-Leonard found probable cause to discipline and stated:

> This hearing officer is convinced, through the admissions of the Employee himself, verbally and in writing, that he understand the legal ramifications of being insubordinate. The Employer, while under no legal obligation to do so, followed the advice of this hearing officer's previous decision, to give the Employee an additional ten days to comply with this order.
>
> The Employee failed to avail himself of the remedies available to him to properly challenge the order.

On June 12, 2006, McCarthy issued a Notice of Termination to McCann that included notice of his rights to appeal. County Exhibit M.

CONCLUSIONS OF LAW

The issue presented is whether McCann was insubordinate for failing to follow the order issued March 17,2006, to wit: follow the recommendations of the Employee Assistance Plan. The testimony provided established that McCann and his supervisors were involved in some type of verbal altercation. The County's witness as well as McCann's witnesses substantiated this. The exhibits reflect that the supervisor referred McCann to the EAP and that the EAP counselor developed recommendations. It is clear that in March of 2006, McCann's supervisors were ordering McCann to follow the recommendations of the EAP counselor. McCann refused to follow these recommendations. McCann noted his refusal to his EAP counselor and to the hearing officer at his pre-disciplinary meeting.

McCann believes the issue is more complicated.

He presented arguments and documentation regarding the ethical requirements, administrative codes and regulations for social workers.

He brought employees from throughout the county and affiliated agencies to testify that he was a courteous and competent worker.

Those issues do not address his refusal to follow the direction of his employer.

If McCann had a valid reason for refusing the order, the hearing officer in his pre-disciplinary hearing gave him very specific instructions on how to follow the direction yet protect his ability to challenge the order:

The appropriate course of action for the Employee was to submit to the order but to acknowledge in writing he was submitting to the procedure under protest.

Such a course of action would allow the Employee to still retain any affirmative defenses he might have to challenge the legality of the order while, at the same time, not subjecting himself to disciplinary charges for insubordination.

After his initial pre-disciplinary hearing, the County gave McCann additional time to comply. McCann refused to comply.

CONCLUSION

The County Executive followed the proper disciplinary procedure. Based upon the testimony and documents presented at the hearing, the County established, by a preponderance of the evidence that McCann was insubordinate. Therefore, McCann's appeal is denied.

Dated: August 30,2006

Case LawTotally Ignored by Lisa Okolish Miller

35 AmJur 44 Disobedience of Employer‘s Rules, Instructions, or Orders

35 AmJur 45 Reasonableness of Rule or Order; Relation to Employer‘s Business Caver v Trenton
3d Cir., No. 04-2600, 8/26/05

34 Freeman v. King Pontiac Company 114 S.E. 2d 478

530 U.S. 133 (2000) 147

42 U.S.C. § 2000e-3 Civil Rights Act

Burlington Northern & Santa Fe Railway Co v. White
United States Supreme Court
No. 05-259 Argued April 17, 2006 – Decided June 22, 2006

Summit County Ordinance 2004-596

Health Insurance Portability and Privacy Act of 1996
(HIPPA)

ABA Model Code of Professional Responsibility

EC 7-15

The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. **A lawyer appearing before an administrative agency,24 regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law.25 Where** the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged26 and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

Case Law

35 AmJur 44 Disobedience of Employer's Rules, Instructions, or Orders

35 AmJur 45 Reasonableness of Rule or Order; Relation to Employer's Business Caver v Trenton
3d Cir., No. 04-2600, 8/26/05

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Summit County Ordinance 2004-596

Health Insurance Portability and Privacy Act of 1996
(HIPPA)

EC 7-20

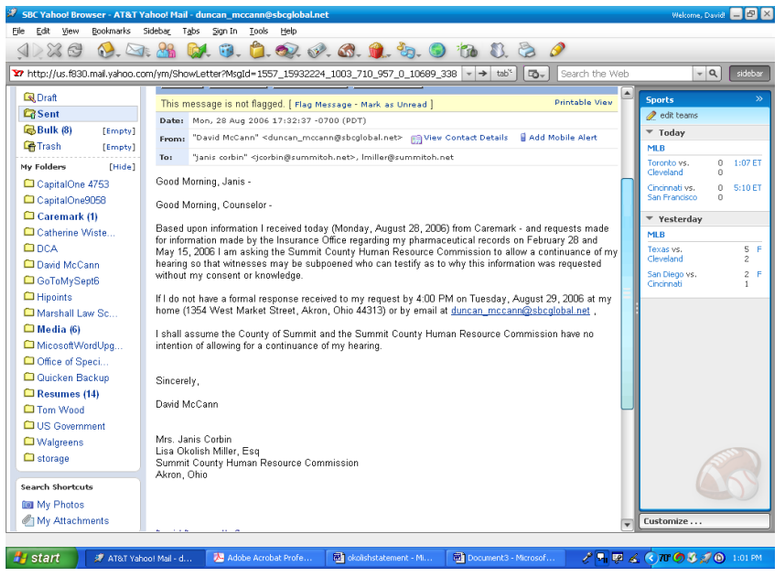
In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently34 according to procedures that command public confidence and respect.35 Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and **dignified process.** The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC 7-26

The law and Disciplinary Rules prohibit the use of ***fraudulent, false, or perjured testimony or evidence.42 A lawyer who knowingly43 participates in introduction of such testimony or evidence is subject to discipline.*** A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.44

EC 7-27

Because it interferes with the proper administration of justice, ***a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce.*** In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.45


SBC Yahoo! Browser - AT&T Yahoo! Mail - duncan_mccann@sbcglobal.net
Good Morning, Janis -
Good Morning, Counselor -
Based upon information I received today (Monday, August 28, 2006) from Caremark - and requests made for information made by the Insurance Office regarding my pharmaceutical records on February 28 and May 15, 2006 I am asking the Summit County Human Resource Commission to allow a continuance of my hearing so that witnesses may be subpoened who can testify as to why this information was requested without my consent or knowledge.
If I do not have a formal response received to my request by 4:00 PM on Tuesday, August 29, 2006 at my home (1354 West Market Street, Akron, Ohio 44313) or by email at duncan_mccann@sbcglobal.net ,
I shall assume the County of Summit and the Summit County Human Resource Commission have no intention of allowing for a continuance of my hearing.
Sincerely,
David McCann
Mrs. Janis Corbin
Lisa Okolish Miller, Esq
Summit County Human Resource Commission
Akron, Ohio

EC 7-33

A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal.

EC 7-35

All litigants and lawyers should have access to tribunals on an equal basis. Generally, i***n adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party***.59 For example, a lawyer should not communicate with a tribunal by a writing unless copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

Page 94

THE HEARING OFFICER: Well, that's the
3 ruling.

4 MR. McCANN: So you and the Executive's
5 office have reached this conclusion?

6 THE HEARING OFFICER: Absolutely not.

7 MR. McCANN: You have not been in
8 communication with the Executive's office?

9 THE HEARING OFFICER: With whom in the
10 Executive's office?

11 MR. McCANN: Members of the
12 Law Department.

13 THE HEARING OFFICER: Oh, yes, I have
14 spoken to Kasie.
15 MR. McCANN: Is that appropriate?

16 THE HEARING OFFICER: Yes. I've spoken to
17 you.

18 MR. McCANN: When have you spoken to me?
19 THE HEARING OFFICER: When I see you in
20 the office.

21 MR. McCANN: Let's see, last week it was,
22 "Have you been helped?"
23 And this morning it was, "Let's get
24 going."

25 THE HEARING OFFICER: Right.

July 12, 2006 Page 261

MR. McCANN: No, this is germane, Hearing
9 Officer, and, again, you are serving as the
10 advocate for the administration. I know
11 you're in an unclassified position, I
12 understand that, but we have got to get to
13 the heart of the matter and you took me to
14 task on Monday how are we going to deal with
15 these issues, and I am prepared in my
16 questioning to deal with these issues.

EC 7-36

Judicial hearings ought to be conducted through ***dignified and orderly procedures*** designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings.60 While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears.61 He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

MR. McCANN: All right. I would also like to make a notation. At the beginning of this hearing, manners are definitely lacking. I was seated out here. She said, "Let's go."

From Page 78 Transcript July 10

Page 79
(Indicating)
I would like particular decorum, where I am addressed courteously throughout this process.
Now, I have noted on your door you have pictures from your children. We cannot divorce ourselves from what as human beings -- as courteous human beings would be expected in this hearing.
THE HEARING OFFICER: Are you --
MR. McCANN: I'm addressing the Hearing Officer.
THE HEARING OFFICER: I heard you.
MR. McCANN: **Now, will we have decorum this morning, Counselor?**
THE HEARING OFFICER: I don't have to answer that.
MR. McCANN: **Courteousness?**
THE HEARING OFFICER: Do you have a Witness to call?
MR. McCANN: Yes, I do.
Who is first on the docket?
MS. CORBIN: I'll go down and see who has signed in. And that's the way we're going to call them.
Page 80
The Hearing Officer has approved a request from the Fiscal -- from Mary Margaret Rowlands from the Fiscal Office to allow the employees from the Fiscal Office to come in first.
(Recess taken.)
- - -
MR. McCANN: I'd like to call a recess for a moment, please.
THE HEARING OFFICER: If the Witness could excuse us for a moment. Just walk back out the door.
MR. McCANN: And I would ask Counsel to please leave for a moment.
MS. BRIGGS: No.
THE HEARING OFFICER: No.
MR. McCANN: **All right. Then I'll go on the record.**
Your last response to me is setting the tone for this hearing. Now, if you want me to be equally as adversarial, I can. But I would prefer that the decorum of this hearing, you as an Officer of the Court, you who have had experience as Chair of the Ashland University Board of Trustees, I would expect a certain decorum.

(4) Knowingly use perjured testimony or false evidence.70

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.71, 72

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.73

Brian Nelsen Page 25 June 10, 2006

A Okay. Back in the fall, there was a phone conversation that had occurred between Dave and Jill Skapin, the county's director of communications, in which Jill to my understanding had asked about some computer software that had been purchased for her computer, her old computer. She had just gotten a new one and wanted this software reinstalled.
My office was next to Dave's at the time of the conversation so all I can really attest to is what I overheard on Dave's end which was, and the reason I know of this is because, again, Dave became agitated during the course of this conversation, his voice kept getting louder and louder and he kept telling Jill, you know, something to the effect of, "I don't have your software. I don't know, you're going to have to check with fiscal," and this continued on for several minutes and like I say, the whole time
Page 26
Dave just kept getting more and more angry with her as he talked to her.

SHANNON LYSENKO
of lawful age, a Witness herein, having been first duly sworn, as hereinafter certified, testified and said as follows:

MS. MILLER: Okay. So you were there.
You heard his end of the conversation?
THE WITNESS: Yes, that's correct.
MS. MILLER: Okay. That's what I was trying to establish.
THE WITNESS: That's correct.
MR. McCANN: Am I permitted now to read the letter?
MS. MILLER: Yes.
MR. McCANN: Dated February 22nd, 2006,
Several weeks ago, David McCann was on the phone with Jill Skapin and was talking to her about software that was on her computer that was not purchased through the purchasing department or approved/installed by the MIS department. He was polite and began to repeat himself several times. It was apparent Jill was not listening. He informed her then an Adobe license was purchased for her computer and put on our inventory list by request of the MIS department after her computer crashed. He had to tell her several times that if they did not want the software, it could be

Page 256
returned. He eventually had to raise his voice to get his point across. At no other time in the six-year period have I ever heard David, I have sat next to him this long, raise his voice or be rude to anyone. It is ludicrous to think that such a polite and mild-mannered man would ever need any anger management. Knowing the personality or lack thereof of Ms. Skapin and how rude

and disrespectful she is to employees, it would be easy to lose your cool. Brian Nelson was also sitting next to David and heard him on the phone. I heard Brian on the phone with Linda Phelps and he explained to her that David was not being rude, that he only raised his voice at the end of the conversation to get his point across. In no way did I ever consider David needing any anger management because of an isolated incident of raising his voice. David is the most polite, courteous and well-mannered man I have ever had the pleasure to work with. In fact, he prides himself on it. I hear nothing but wonderful compliments regarding his behavior from county employees and

Page 257
vendors. David informed me that the day after he filed his harassment complaint with the Ohio Civil Rights Commission and the day after the complaint was published in the Akron Beacon Journal, that he was forced to sign an Ease at Work form for anger management. This incident happened several weeks ago and was not mentioned to him until February 22nd of 2006. It is obvious retaliation for filing the complaint. This harassment has caused a hostile work environment. **Sincerely, Shannon Lysenko.**

Your letter is in sharp contrast to Mr. Nelson's testimony where no mention was made to his immediately calling the director of finance and budget to say that I was not rude.

Page 26 June 5, 2006

4 MR. NELSEN :A The other incident refers to an incident which I
5 was told about shortly after I started working for
6 the county that had occurred **three or four years**
7 ago in which Dave, and I'm not going to pretend to
8 know all the facts of what happened here, but Dave
9 had become upset with something that was said to
10 another employee and marched down to Linda Phelps'
11 office, slammed the door and began yelling at her
12 about how unappreciated the employees were.

13 MS. MILLER: Can I interrupt? Are you
14 going to have her testify about that then?

15 MS. BRIGGS: No.

Page 274 July 10, 2006 JOYCE SLOAN

11 of lawful age, a Witness herein, having been first duly
12 sworn, as hereinafter certified, testified and said as
13 follows:

21 Q Thank you, Joyce. Three years ago in July of
22 2003, you were director of purchasing; is that
23 correct?
24 A Correct.

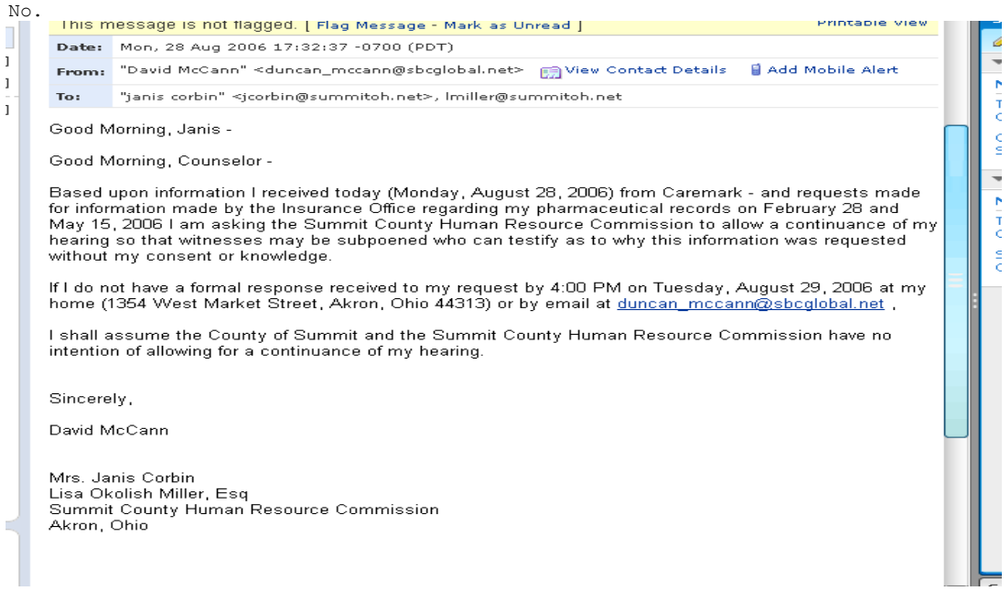
Page 277

1 If I had an anger problem in 2003, it would
2 have been noted on my job evaluation?
3 A Yes.

Page 28 June 10, 2006
MICHELLE SMITH
14 of lawful age, a Witness, having been first duly sworn,
15 as hereinafter certified, testified and said as follows:

Page 29
8 A I have several areas that I'm involved with,
9 overseeing Workers' Comp, the health benefits,
10 substance abuse program and training and the EAP
11 program.

24 Q Okay. Do you deal at all with the actual
25 counselors or the actual service providers?
Page 31
1 A No, the only contact I deal with is Debbie.
2 Q Okay. So you don't speak with any of the
3 providers?
4 A No.



This message is not flagged. [Flag Message - Mark as Unread] Printable View

Date: Mon, 28 Aug 2006 17:32:37 -0700 (PDT)

From: "David McCann" <duncan_mccann@sbcglobal.net> View Contact Details Add Mobile Alert

To: "janis corbin" <jcorbin@summitoh.net>, lmiller@summitoh.net

Good Morning, Janis -

Good Morning, Counselor -

Based upon information I received today (Monday, August 28, 2006) from Caremark - and requests made for information made by the Insurance Office regarding my pharmaceutical records on February 28 and May 15, 2006 I am asking the Summit County Human Resource Commission to allow a continuance of my hearing so that witnesses may be subpoened who can testify as to why this information was requested without my consent or knowledge.

If I do not have a formal response received to my request by 4:00 PM on Tuesday, August 29, 2006 at my home (1354 West Market Street, Akron, Ohio 44313) or by email at duncan_mccann@sbcglobal.net ,

I shall assume the County of Summit and the Summit County Human Resource Commission have no intention of allowing for a continuance of my hearing.

Sincerely,

David McCann

Mrs. Janis Corbin
Lisa Okolish Miller, Esq
Summit County Human Resource Commission
Akron, Ohio

EC 8-6

Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament.

MR. McCANN: All right. I would also like to make a notation. At the beginning of this hearing, manners are definitely lacking. I was seated out here. She said, "Let's go."

From Page 78 Transcript July 10

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1 (Indicating)
2 **I would like particular decorum, where I**
3 am addressed courteously throughout this
4 process.
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11 MR. McCANN: I'm addressing the Hearing
12 Officer.
13 THE HEARING OFFICER: I heard you.
14 MR. McCANN: **Now, will we have decorum**
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18 MR. McCANN: **Courteousness?**
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5 (Recess taken.)
6 - - -
7 MR. McCANN: I'd like to call a recess for
8 a moment, please.
9 THE HEARING OFFICER: If the Witness could
10 excuse us for a moment. Just walk back out
11 the door.
12 MR. McCANN: And I would ask Counsel to
13 please leave for a moment.
14 MS. BRIGGS: No.
15 THE HEARING OFFICER: No.
16 MR. McCANN: **All right. Then I'll go on**
17 the record.
18 Your last response to me is setting the
19 tone for this hearing. Now, if you want me to
20 be equally as adversarial, I can. But I would
21 prefer that the decorum of this hearing, you
22 as an Officer of the Court, you who have had
23 experience as Chair of the Ashland University
24 Board of Trustees, I would expect a certain
25 decorum.

EC 9-4

Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

Page 94

THE HEARING OFFICER: Well, that's the
3 ruling.

4 MR. McCANN: So you and the Executive's
5 office have reached this conclusion?

6 THE HEARING OFFICER: Absolutely not.

7 MR. McCANN: You have not been in
8 communication with the Executive's office?

9 THE HEARING OFFICER: With whom in the
10 Executive's office?

11 MR. McCANN: Members of the
12 Law Department.

13 THE HEARING OFFICER: Oh, yes, I have
14 spoken to Kasie.
15 MR. McCANN: Is that appropriate?

16 THE HEARING OFFICER: Yes. I've spoken to
17 you.

18 MR. McCANN: When have you spoken to me?
19 THE HEARING OFFICER: When I see you in
20 the office.

21 MR. McCANN: Let's see, last week it was,
22 "Have you been helped?"
23 And this morning it was, "Let's get
24 going."

25 THE HEARING OFFICER: Right.

EC 9-6

Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; **to encourage respect for the law** and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive **to avoid not only professional impropriety but also the appearance of impropriety.**

Page 81
1 Now, your last response to me was not
2 acceptable. I simply asked a question: Will
3 there be a courteousness to this hearing?
4 And you said, "I don't have to answer
5 that."
6 Now, what is it to be, Counselor?
7 THE HEARING OFFICER: Dave, I don't have
8 to answer your question. I don't have to act
9 in any way that you prefer that I act. I will
10 conduct this hearing fairly and impartially
11 and in the manner that I see fit.
12 MR. McCANN: All right.
13 THE HEARING OFFICER: So we will call our
14 first Witness.
15 MR. McCANN: Will there be a decorum?
16 THE HEARING OFFICER: Dave, I'm finished
17 with that.
18 MR. McCANN: So courteousness is out?
19 THE HEARING OFFICER: I'm not answering.
20 Bring the next Witness in.
21 (Thereupon, Mr. Baumann
22 entered the conference Room.)
23 MR. McCANN: Here is a Bible for this
24 morning. (Indicating)
25 (Thereupon, the Witness was sworn in.)

Case LawTotally Ignored by Lisa Okolish Miller

35 AmJur 44 Disobedience of Employer's Rules, Instructions, or Orders

35 AmJur 45 Reasonableness of Rule or Order; Relation to Employer's Business Caver v Trenton
3d Cir., No. 04-2600, 8/26/05

34 Freeman v. King Pontiac Company 114 S.E. 2d 478

530 U.S. 133 (2000) 147

42 U.S.C. § 2000e-3 Civil Rights Act

Burlington Northern & Santa Fe Railway Co v. White
United States Supreme Court
No. 05-259 Argued April 17, 2006 – Decided June 22, 2006

Summit County Ordinance 2004-596

Health Insurance Portability and Privacy Act of 1996 (HIPPA)